United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
and	)	**Docket Nos. 11-514 & 11-653**
	)	**Issued: November 9, 2011**
DEPARTMENT OF VETERANS AFFAIRS, NORTHPORT VETERANS HOSPITAL, Northport, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On December 28, 2010 appellant, through counsel, filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) decision dated November 29, 2010 denying modification of a loss of wage-earning capacity determination. The Board assigned Docket No. 11-514. On January 19, 2011 appellant's counsel filed a timely appeal from a November 29, 2010 decision concerning the termination of her compensation based on her refusal of an offer of suitable work. The Board assigned Docket No. 11-653. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of both cases.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish that a modification of the loss of wage-earning capacity determination is warranted; and (2) whether

[1] 5 U.S.C. § 8101 *et seq.*

OWCP properly terminated appellant's compensation benefits on October 8, 2009 pursuant to 5 U.S.C. § 8106(c).

On appeal, appellant's attorney asserts that both November 29, 2010 decisions are contrary to fact and law. He contends that the November 22, 2006 wage-earning capacity was erroneous as the constructed position was outside appellant's work restrictions.

FACTUAL HISTORY

This case has previously been before the Board**.** In the first appeal, the Board, in an August 25, 1997 decision, set aside decisions of OWCP dated August 19, April 14 and February 15, 1994.[2] The Board found the evidence of record sufficient to warrant further development of the issue as to whether appellant sustained a recurrence of disability beginning November 29, 1993 causally related to her accepted April 13, 1992 employment injury.[3] In the second appeal, the Board issued a decision on July 24, 2001, in which it found an unresolved conflict in the medical opinion evidence as to whether appellant sustained a recurrence of disability beginning November 29, 2003.[4] Thus, the Board set aside OWCP's February 1, 1999 decision denying her claim for a recurrence of disability beginning November 29, 1993 and remanded for further development. In the third appeal, the Board issued a decision on July 16, 2009 affirming OWCP's January 17, 2008 overpayment decision.[5] On June 10, 2010 in a fourth appeal, the Board issued an order remanding the case and setting aside a June 30, 2009 nonmerit decision.[6] The Board found OWCP erred in denying a merit review of appellant's request for modification of a November 22, 2006 loss of wage-earning capacity decision. The facts surrounding the appeals were provided in the Board's prior decisions and are incorporated herein by reference. The facts relevant to the current appeal are set forth below.

In a September 13, 2005 report, Dr. Richard L. Collins, a second opinion Board-certified orthopedic surgeon, diagnosed resolved cervical and lumbosacral strains and herniated disc at L3-4 and L4-5. He indicated that appellant was capable of working full time with restrictions, which included up to four hours of sitting, walking and standing and no lifting, pulling or pushing more than 20 pounds.

In a November 22, 2006 decision, OWCP reduced appellant's compensation to reflect its determination that she was capable of earning wages in the constructed position of telephone solicitor working a 40-hour week. It found that this represented her wage-earning capacity based upon the report of Dr. Collins.

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[2] Docket No. 95-619 (issued August 25, 1997).

[3] On April 24, 1992 appellant, then a 26-year-old respiratory therapist, filed a traumatic injury claim alleging that she injured her back while lifting a patient on April 13, 1992. OWCP accepted the claim for cervical and lumbosacral sprains and herniated disc at L3-4 and L4-5.

[4] Docket No. 99-1516 (issued July 24, 2001).

[5] Docket No. 08-1157 (issued June 16, 2009).

[6] Docket No. 09-1977 (issued June 10, 2010).

In a January 8, 2007 report, Dr. Sanford A. Ratzan, appellant's treating Board-certified orthopedic surgeon, reviewed Dr. Collins' report and work restrictions and noted that appellant's complaints of persistent pain when sitting or standing for periods of time. A physical examination revealed restricted lumbosacral flexion and paraspinal lumbar muscle spasm. Dr. Ratzan reviewed the position description for telephone solicitor and opined that appellant was unable to perform this job as she had difficulty sitting for short periods of time as well as difficulty getting up and down from a chair.

On September 24, 2007 OWCP referred appellant to Dr. Jeffrey S. Levine, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Ratzan, appellant's treating Board-certified orthopedic surgeon, and Dr. Collins, a second opinion Board-certified orthopedic surgeon, regarding appellant's work restrictions.

In an October 31, 2007 report, Dr. Levine, based upon a review of the medical records, statement of accepted facts and physical examination diagnosed resolved cervical strain, chronic lower back pain and nonemployment-related cubital tunnel syndrome. He concluded that appellant was capable of working full time with restrictions. The restrictions he found were no lifting more than 10 pounds or 5 pounds on a repetitive basis; refrain from strenuous pulling and pushing; no remaining in one position for more than 2 hours; a 15-minute break every 2 hours; and the ability to frequently change position as needed.

On March 5, 2008 the employing establishment offered appellant the position of medical support assistant based on the work restrictions set by Dr. Levine, in his October 31, 2007 report. The position was located in Northport, New York. The employing establishment stated that it had contacted two of its facilities within 50 miles of her current residence, Fountain Hill, Arizona, and neither had responded. The position description indicated that the duties and responsibilities were clerical and included answering the telephone, mailings, trending information, reviewing patient response to health-related correspondence and tracking. The physical restrictions were listed as two hours of sitting at a time and standing; six hours of walking; limited bending/stooping and twisting; up to one pound of lifting, pushing and pulling for one half to one hour per day; and a 15-minute break every two work hours. Lastly, Dr. Levine concluded that the job of telephone solicitor was within appellant's work restrictions and she was capable of performing this position.

On March 13, 2008 appellant declined the position on the grounds that it was medically unsuitable, she had been separated from service with the employing establishment and no longer resided in the commuting area of Northport, New York.

On April 1, 2008 OWCP informed appellant that it had reviewed the physical requirements of the offered position and had determined that it was suitable as it conformed with the her work capabilities. The employing establishment confirmed that the position remained available to her. OWCP instructed appellant that she must, within 30 days, either accept the position or provide a written explanation of the reason she did not accept the position, or she could lose her right to compensation under 5 U.S.C. § 8106(c) of FECA.

In an April 10, 2008 letter, appellant's counsel rejected the job offer on the grounds that she was not physically capable of performing the job and the position was not near her current residence.

On July 9, 2009 OWCP informed appellant that it had reviewed the physical requirements of the offered position and had determined that it was suitable as it conformed to her work capabilities. The employing establishment confirmed that the position remained available to her. OWCP instructed appellant that she must, within 30 days, either accept the position or provide a written explanation of the reason she did not accept the position, or she could lose her right to compensation under 5 U.S.C. § 8106(c) of FECA.

In a July 23, 2009 letter, appellant's counsel contended the offered position was not suitable as appellant currently resided in Arizona and the position was located in New York; the work restrictions of the offered position were outside her current medical restrictions and that the medical report upon which the offered position was based was more than two years old.

By letter dated August 13, 2009, OWCP found that the reasons given by appellant for refusing the offered position were not valid. It gave her 15 additional days to accept the position or to make arrangements to report to this position. OWCP noted that, if she did not accept the position within 15 days of the date of the letter, her right to compensation for wage loss or a schedule award would be terminated pursuant to section 8106 of FECA. It added that it would not consider any further reasons for refusal.

By decision dated September 10, 2009, OWCP terminated appellant's compensation effective September 13, 2009 based on her refusal of an offer of suitable work, pursuant to 5 U.S.C. § 8106(c).

On August 31, 2010 appellant's counsel requested reconsideration of the September 10, 2009 decision termination her wage-loss compensation pursuant to section 8106(c).

In a November 29, 2010 decision, OWCP denied modification of the November 22, 2006 loss of wage-earning capacity decision.

In a separate November 29, 2010 decision, OWCP denied modification of the September 10, 2010 decision terminating her wage-loss compensation pursuant to section 8106(c).

LEGAL PRECEDENT -- ISSUE 1

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.[7] Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[8] OWCP's procedure manual provides that, if a

[7] *T.M.*, Docket No. 08-975 (issued February 6, 2009); *D.M.*, 59 ECAB 164 (2007); *Harley Sims, Jr.*, 56 ECAB 320 (2005).

[8] *Katherine T. Kreger*, 55 ECAB 633 (2004).

formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss.[9] The procedure manual further indicates that, under these circumstances, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity decision.[10]

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.[11] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[12]

In addition, Chapter 2.814.11 of OWCP's procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. OWCP procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If OWCP is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.[13]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained cervical and lumbosacral sprains and herniated disc at L3-4 and L4-5 as a result of her accepted April 13, 1992 employment injury. In a November 22, 2006 decision, it adjusted her compensation to reflect its determination that she was capable of earning wages in the constructed position of telephone solicitor for 40 hours per week. Appellant's counsel does not contend that there has been a material change in the nature and extent of her injury-related condition or that she has been retrained or otherwise vocationally rehabilitated. On appeal he contends that the original wage-earning capacity determination was erroneous.

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[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). *See Mary E. Marshall*, 56 ECAB 420 (2005).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). *See Harley Sims, Jr.*, *supra* note 7.

[11] *See Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984); *A.J.*, Docket No. 10-619 (issued June 29, 2010); *D.M.*, *supra* note 7.

[12] *See F.B.*, Docket No. 10-99 (issued July 21, 2010); *Harley Sims, Jr., supra* note 7*; Stanley B. Plotkin, supra* note 11.

[13] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (October 2009).

The Board finds that appellant also has not shown that the original determination of her wage-earning capacity was erroneous. Appellant noted that the work restrictions provided by both Drs. Collins and Levine support her contention that the constructed position was outside her work restrictions. She noted that Dr. Collins' restrictions were for up to four hours of sitting, standing and walking while the restrictions provided by Dr. Levine provided for two hours of sitting at a time and standing; six hours of walking; limited bending/stooping and twisting; up to one pound of lifting, pushing and pulling for one half to one hour per day; and a 15-minute break every two work hours. Appellant contends that on the basis of these restrictions the constructed position of telephone solicitor working a 40-hour week was erroneous. However, both Drs. Collins and Levine concluded that appellant was capable of working full time or 40 hours per week with restrictions.

Moreover, Dr. Levine was selected as the impartial medical examiner to resolve the issue of appellant's work restrictions, a conflict which arose between Dr. Ratzan, appellant's treating physician, and Dr. Collin, a second opinion physician. He concluded that appellant's employment-related cervical condition had resolved, that appellant continued to experience back pain but that she was capable of working with restrictions. Dr. Levine reviewed the position of telephone solicitor and found that it was within the work restrictions he provided. As an impartial medical examiner, his report was thorough and thus represents the special weight of the medical evidence.

Appellant offered no new evidence to establish the November 22, 2006 wage-earning capacity decision was erroneous. She therefore did not establish that the November 22, 2006 wage-earning capacity decision should be modified

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

LEGAL PRECEDENT -- ISSUE 2

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation.[14] Under section 8106(c)(2) of FECA, OWCP may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[15] To justify termination, OWCP must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[16] Section 8106(c) will be narrowly construed as it serves as a penalty

[14] *N.M.*, Docket No. 08-2081 (issued September 8, 2009); *A.W.*, 59 ECAB 593 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

[15] 5 U.S.C. § 8106(c)(2); *see also L.C.*, Docket No. 08-1923 (issued May 13, 2009); *M.M.*, 59 ECAB 680 (2008); *Mary E. Woodard*, 57 ECAB 211 (2005); *Geraldine Foster*, 54 ECAB 435 (2003).

[16] *T.S.*, 59 ECAB 490 (2008); *Bryan O. Crane*, 56 ECAB 713 (2005); *Ronald M. Jones*, 52 ECAB 190 (2000).

provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[17]

Regulations implementing FECA provide that, if possible, the employer should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former duty station or other location.[18]

ANALYSIS -- ISSUE 2

On March 5, 2008 the employing establishment offered appellant a sedentary position in Northport, New York, which accommodated the work restrictions given by the impartial medical examiner, Dr. Levine. OWCP reviewed the position and found it to be suitable for her. After appellant refused the position on the grounds that it was not suitable or within her commuting area, OWCP terminated her compensation for refusing suitable work.

To properly terminate compensation under section 8106(c), OWCP must provide appellant notice of its finding that an offered position is suitable and give her an opportunity to accept or provide reasons for declining the position.[19] By letter dated July 9, 2009, OWCP advised her that the position was suitable and provided her 30 days to accept the position or provide reasons for her refusal. OWCP further notified appellant that the position remained open, that she would be paid for any difference in pay between the offered position and her date-of-injury job, that she could still accept without penalty and that a partially disabled employee who refused suitable work was not entitled to compensation.

By July 23, 2009 letter, appellant's counsel refused the position because the position was not located near her current residence.

The Board notes that OWCP did not make an attempt to determine whether suitable employment was possible or practical in or around Fountain Hill, Arizona, the location where appellant, resided at the time of the job offer. By regulation, when an employee would need to move to accept an offer of reemployment, the employing establishment should, if possible, offer suitable reemployment in the location where the employee resided at the time of the job offer. The record contains no evidence that the employing establishment made any effort to determine whether such reemployment was possible in or around Fountain Hill, Arizona other than noting that it contacted two locations and received no response. OWCP should have developed this aspect of the case before finding the offer suitable. Its regulations state that the employer should offer suitable reemployment where the employee currently resides, if possible.[20] In this case,

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[17] *E.M.*, Docket No. 09-39 (issued March 3, 2009); *Karen M. Nolan*, 57 ECAB 589 (2006); *Richard P. Cortes*, 56 ECAB 200 (2004); *Joan F. Burke*, 54 ECAB 406 (2003).

[18] 20 C.F.R. § 10.508. *See T.S.*, *supra* note 16; *T.T.*, 58 ECAB 296 (2007); *Sharon L. Dean*, 56 ECAB 175 (2004).

[19] *See T.T.*, *supra* note 18; *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff d on recon.*, 43 ECAB 818 (1992).

[20] 20 C.F.R. § 10.508. *See T.S.*, *supra* note 16; *T.T.*, *supra* note 18; *Sharon L. Dean*, *supra* note 18.

appellant would have needed to move from Fountain Hill, Arizona to accept the offered position in Northport, New York. OWCP, therefore, should have developed the issue of whether suitable reemployment was possible in the Fountain Hill, Arizona area. The Board finds that OWCP erred in terminating appellant's compensation benefits without positive evidence showing that such an offer was not possible or practical.[21]

Under the circumstances of this case, OWCP did not properly find that appellant refused suitable work.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that a modification of the loss of wage-earning capacity determination was warranted. The Board further finds that OWCP failed to meet its burden of proof to terminate appellant's compensation effective September 13, 2009 on the grounds that she refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 29, 2010 concerning modification of a loss of wage-earning capacity is affirmed. OWCP's decision dated November 29, 2009 regarding the termination of compensation pursuant to section 8106(c) is reversed.

Issued: November 9, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[21] *Id.*